Supreme Court of the United States

OCTOBER TERM 1945

No.....

JAMES A. TAYLOR,

Petitioner,

against

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN SUPPORT OF THE FOREGOING PETITION

The Opinions Below

The opinion of the Court of Appeals of the State of New York is reported in 294 N. Y. 397.

The decision of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, was without opinion (269 App. Div. 662, 53 N. Y. S. 2d 469).

The opinion of the Trial Court is unreported. It is contained in the record at page 39.

Jurisdiction

The grounds and basis of jurisdiction for the granting of the writ are set forth in the petition at pages 2-4, *supra.*

Statement of the Case

The case is stated in the petition, at pages 4-9, *supra.*

Synopsis of Argument

The rights of interstate railway employees injured in the course of their employment, are governed by the Federal Employers' Liability Act to the exclusion of derogatory State laws (*New York Central R. Co.* v. *Winfield,* 244 U. S. 147 reversing 216 N. Y. 284).

The fact that petitioner's employment to render the railway service was by or through The Pullman Company does not alter petitioner's rights, because:

First, in furnishing and rendering railway transportation and service, The Pullman Company itself is a "common carrier by railroad";

Secondly, under and by virtue of the contract between The Pullman Company and the Central, petitioner was in the employ of the Central as well and as much as in that of The Pullman Company;

Thirdly, Central cannot impair the rights and immunities given by Federal Law to railway employees—or acquire defenses against them under State law in derogation of the Federal statute—by contracting with another corporation for the rendition of railway service through men hired and paid by or through such other corporation.

POINT I

In the operation of cars and in furnishing transportation thereby and service therein, The Pullman Company itself is a "common carrier by railroad."

Section 1 of the so-called Federal Employers' Liability Act (Section 51 of Title 45 of the U. S. Code), provides:

> "Every common carrier by railroad while engaging in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier * * *."

Under the same Section:

> "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth,"

is an employee in such commerce entitled to the benefits of the Section.

Section 5 (Sec. 55 of Title 45) provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

The limitation under that Act is three years (Section 56). Under the same section, the State and Federal courts are given concurrent jurisdiction over actions by injured employees of carriers.

It is, of course, settled that the rights and remedies of employees of interstate railways, injured in the course of their employment, are controlled exclusively by the Federal Employers' Liability Act (Chap. 2, Title 45, U. S. Code) and that it is paramount to and excludes the New York Workmen's Compensation Law (*New York Central Co.* v. *Winfield,* 244 U. S. 147, reversing 216 N. Y. 284).

In recognition of that principle, the New York case of *Reinhart* v. *Gerosa Crane Service Co.,* 263 App. Div. 28, 31 N. Y. S. 2d 162, held that Section 29 of the Workmen's Compensation Law did not impair the right of a maritime employee, who accepted compensation under that statute, to maintain his action against the third party whose negligence caused his injuries.

The defendant herein has prevailed in the courts of New York on its argument that the foregoing have no application because the plaintiff was an employee of The Pullman Company. The Trial Court ruled (R., p. 39):

> "* * * The Pullman Company does not appear to be considered a common carrier engaged in interstate commerce in this circumstance (Robinson v. Baltimore & Ohio Rr. Co., 237 U. S. 84; * * *"

The Court of Appeals, relying on *Robinson* v. *Baltimore & Ohio Railroad Co.,* held that the petitioner was not in any sense or to any degree an employee of Central (294 N. Y. 397, at pp. 403-404) and (at pp. 404-405):

> "Nor does plaintiff, as an employee of the Pullman Company, come within the Federal Act and escape the controls of the Workmen's Compensation Law. We find no express holding in the cases as to whether or not an operator of parlor and sleeping

> cars is liable to its porters under the Federal Act, but the answer seems plain enough * * *."

citing *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175, *United States, ex rel. Chicago, New York & Boston Refrigerator Co.* v. *Interstate Commerce Commission*, 265 U. S. 292, and several New York cases.

That the Trial Court erred in regarding *Robinson* v. *Baltimore & Ohio Railroad Co.* as holding that The Pullman Company was not a "carrier by railroad," was recognized by the Court of Appeals, for in their opinion they say that they "*find no express holding in the cases as to whether or not an operator of parlor and sleeping cars is liable to its porters under the Federal Act.*"

We submit that the Court of Appeals, in turn, erred in regarding the two cases cited by it as being so analogous that it "seems plain enough" that The Pullman Company is not a "carrier by railroad." Each of those cases, we respectfully submit, is plainly distinguishable and affords no parallel.

In the *Wells Fargo & Co.* case, Wells Fargo & Co. owned no railroad cars. It did not carry on rails. It engaged in the express business. As far as its customers were concerned, it could transport the goods by truck, boat or any other means. In procuring carriage by railroad, the express company was hiring carriage service, not rendering it. The distinction is made clear in *U. S.* v. *American Railway Express Co.*, 246 U. S. 425, wherein it was said "that the natural meaning of the term 'carrier by railroad' is one who operates a railroad, not one whose shipments are carried by a railroad" (at p. 432).

Unlike express companies, The Pullman Company is not one who pays for carriage but is paid therefor. It does not contract for railway services to be rendered to it. It contracts to furnish the cars and to carry and service

passengers thereon. The cars and the fares and the service must comply with all the provisions and requirements of the railway statutes, including the "Safety Appliance Act" (Sections 1-16, Title 45, U. S. Code), and of the Interstate Commerce Commission.

The *Chicago Refrigerator Co.* case did not arise under the Federal Employers' Liability Act. It dealt with the claim of the Refrigerator Co. to a government railway subsidy under the Transportation Act of 1920. The Refrigerator Co. did nothing more than rent its cars to railway companies for a per mile rental; it did not in any way participate in the operation thereof. As a mere lessor of equipment, wholly disassociated from the operation thereof, it was not a carrier. It filed no tariffs with the Interstate Commerce Commission. It was incorporated to do a manufacturing business, and was not authorized by its articles of incorporation to operate as a carrier. This Court confirmed the correctness of the finding by the lower Court "that the Refrigerator Co. is not incorporated as a carrier, does not control or use the necessary facilities for performing carriage, does not hold itself out to perform carriage by publishing rates applicable thereto, and does not in fact perform carriage or receive any compensation from shippers whose shipments move in its cars. The cars are rented to railway companies. They are subject to the control of the latter and are to all intents and purposes their property during the period of lease. In a word the Refrigerator Co. carries nothing."

The facts as to The Pullman Company are in direct antithesis to the foregoing in every detail.

If The Pullman Company, insofar as it operates railroad cars and furnishes railway service, is not a "common carrier by railroad," what is it? Can anyone supply a reasonable definition which would exclude the operator of conveyances run as part of a regular railway service,

available to all who pay the price as fixed by tariffs approved by the Interstate Commerce Commission? If there could be any doubt on the subject, the Interstate Commerce Act (Title 49 of the U. S. Code) leaves no room for quibbling, for it expressly provides in subdivision 3 of Section 1 (emphasis supplied):

> "(a) The term 'common carrier' as used in this chapter shall include * * * *sleeping car companies;* and all persons, natural or artificial, engaged in such transportation as aforesaid, as common carriers for hire."

When one travels in a parlor car or in a sleeping car, is he not being carried by railroad? How can it reasonably be said that the company which furnishes him with the seat or the berth or the room and who receives part of his fare, is not engaged in the business of carrying him by railroad?

Is the carrier only the company which furnishes the locomotion? Is not the company which furnishes the vehicle on which the passenger is carried, and who looks after him throughout the journey, also the carrier?

We urge that since carriage cannot be effected without either the locomotive or the passenger car, where several join to bring about the requisite combination, the owner and operator of the one is as much the carrier as the owner and operator of the other. In such circumstances, the carriage results only from the combination, and both and each are carriers.

POINT II

Indeed, the contract between The Pullman Company and Central recognized the necessity of each to the other in the furnishing of this class or type of railroad transportation, and thus provided for joint operation on a joint venture basis. Therefore, the plaintiff was as much an employee of Central as of The Pullman Company.

We recognize that the similar argument in *Robinson* v. *Baltimore & Ohio Railroad Co., supra,* 237 U. S. 84, was rejected. But the rejection there was based upon the contract there adduced. We believe that substantial differences between the contract there in evidence and the contract here in evidence, should lead to a different conclusion.

That there is no rule of thumb for the determination of such questions is demonstrated by *Oliver* v. *North Pacific Railroad Co.,* 196 Fed. 432, where, upon the evidence there adduced, the Court found that the Pullman porter's employment was by The Pullman Company and the railroad company jointly, and, consequently, the release stipulation in the porter's contract with The Pullman Company was no defense to his action against the railroad company.

Here the contract between The Pullman Company and Central (Pltf.'s Ex. 1, R., pp. 40-65) was substantially different from the contract between The Pullman Company and the Baltimore & Ohio Railroad Co. introduced in evidence in the *Robinson* case. In the latter case, according to the opinion, "The Pullman Company supplied its own facilities" except for hauling and oiling, and the railroad company received no part of the revenue up to $7,750 per car per annum. Only if the revenue exceeded that, and to the extent of one-half of such excess, did the railroad company share in the revenue.

In contrast, the contract here provided for sharing both in the operation and maintenance (by a dovetailing of services and allocation of expenses) and in the net profits —net, not as in the *Robinson* case, in the gross receipts above a stated figure.

The contract here was for the furnishing and manning of sleeping cars and parlor cars "to meet the requirements of travel over the lines of" Central (R., p. 40), and also "combined baggage-club cars or other non-revenue cars" (R., p. 41). It provided for certain services to be rendered by Central and other services by The Pullman Company, to the satisfaction of Central, so that, in combination, the required railway services would be rendered satisfactorily; and it provided for a sharing of the revenue, profits, and responsibility.

Under the agreement, the cars are furnished by The Pullman Company (R., pp. 40-41) subject to purchase thereof by Central upon the termination of the agreement (R., pp. 41, 64-65), and are hauled by Central without charge to The Pullman Company (R., p. 45). Also without charge to The Pullman Company, Central's agents sell Pullman tickets at its railroad ticket offices, and, among other things, it furnishes storing facilities, inspects for repairs, lubricates the cars, furnishes ice water, furnishes cooling energy for air-conditioning, furnishes the heating for cars, disposes of refuse (R., pp. 45-47). The cost of those services are not included "in the operating expenses in the settlement of accounts" between the parties (R., p. 47).

Other services are furnished by The Pullman Company, the cost of which are "included in the operating expenses in the settlement of accounts" (R., pp. 47-48).

The defrayal of the cost of air-conditioning old cars is provided for in a supplemental agreement not in evidence (R., p. 42). The cost of maintaining and operating the air-

conditioning in new cars (other than the cooling energy which is furnished by Central without charge) is borne by Central to the extent of 75% and by The Pullman Company to the extent of 25% (R., p. 42).

Responsibility for damages to the cars and for personal injuries, in some circumstances, are borne by The Pullman Company and in other circumstances by Central (R., pp. 44, 48-51).

The net earnings, computed in accordance with the contract, are divided in accordance with complicated formulae (R., pp. 52-58). The division substantially is as follows: Of the net operating earnings "of all sleeping cars and new type light weight parlor cars" (R., pp. 52-56) until The Pullman Company gets 80% of a return of 1¾% per annum on its cost of the cars and equipment plus 2% on the depreciated cost thereof plus 3¾% on the employed working capital, Central gets 20% and The Pullman Company 80% of the gross profits, and of the profits above that, Central gets 60% and The Pullman Company 40% up to a certain point and thereafter they are divided equally (R., pp. 52-56). Of the net operating revenue derived from the operation of "present type parlor cars, combined baggage-club cars and other non-revenue cars," The Pullman Company receives an amount equal to 2% of the cost of those cars plus 2% of the depreciated cost plus 3¾% on the employed working capital, and the remainder is divided 40% and 60% up to a certain point and thereafter equally (R., pp. 56-58).

It seems to us clear that this is a joint venture arrangement for the furnishing of required interstate railway facilities and services. Central hauled these cars as part of its trains; the occupants of those cars were its passengers whose regular fares it enjoyed in full and whose supplementary fares it shared with The Pullman Company. The defendant was as much—at least, as much—interested in the operation and revenue of these cars as The Pullman Company. These cars were an essential part of Central's railway service.

The plaintiff herein as a porter on one of the Pullman sleeping cars was rendering service to Central's passengers in that car; he was rendering a service which Central was bound to render and had a legal duty to render.

As far as the passengers are concerned, this Court held in *Pennsylvania Railroad Company* v. *Roy*, 102 U. S. 451, the employees in the sleeping car were the employees of the hauling railway company—

> "For the purposes of the contract under which the railroad company undertook to carry Roy over its line, * * * *the sleeping car company, its conductor and porter, were, in law, the servant and employees of the railroad company.* Their negligence, or *the negligence of either of them*, as to any matters involving the safety or security of passengers while being conveyed, was the negligence of the railroad company" (at p. 457; italicization supplied).

Although the petitioner thus was an employee of Central to the passengers, is it reasonable to hold that he was not such an employee with respect to his statutory rights as a railway employee, even though Central shared in the extra charge made for the sleeping car accommodations and for the petitioner's service?

POINT III

Petitioner cannot be deprived of his rights, under the Federal Employers' Liability Act, as a railway employee in interstate carriage, by being employed through The Pullman Company.

Robinson v. *Baltimore & Ohio Railroad Company*, we submit, is not applicable here also for another reason: That case did not pass on the question of whether a Pullman Company porter is or is not an employee of a "common carrier by railroad"; it was decided only that porter

Robinson was not an employee of the Baltimore & Ohio Railroad Co.; his status under the Act as an employee of The Pullman Company was not discussed.

In other words, whether as between the porter and The Pullman Company, the former was protected, and his rights were controlled, by the Federal Employers' Liability Act, was not the question in the *Robinson* case, as it is here.

The defense pleaded in that case was that Robinson, unlike the plaintiff in this case, in his contract with The Pullman Company, had agreed not to sue, and had released from liability to him, any railway company on whose road his employment might carry him. This Court held that the Employers' Liability Act nullified such a release by an employee to his employer, but did not strike down such a release of a railway which was not his employer. In other words, the case hinged, not on whether Robinson was a railway employee covered by the Act, but on whether there was an employer-employee relationship between him and the Baltimore & Ohio Railroad.

Here, on the other hand, the question is the basic one of whether the State law or the Federal law applies, and the answer, it seems plain, is dependent not on the identity of the petitioner's employer but on the nature of petitioner's service.

Petitioner's cause of action against the Central was not in enforcement of the latter's liability as employer but as a negligent carrier. His action was the ordinary and usual one against a carrier for negligence, it being immaterial whether he was on the train as a fare paying passenger or otherwise, so long as he was lawfully on the train (*Seybolt* v. *N. Y. L. E. & W. R. R. Co.*, 95 N. Y. 562; *Brewer* v. *Same*, 124 N. Y. 59, and cases cited therein).

It is Central which, invoking the alleged operation of the New York Workmen's Compensation Law as between the petitioner and The Pullman Company, asserts, as a

third party, a special benefit and immunity from the fact that at the time of the accident the petitioner was in the employ of The Pullman Company and he delayed bringing the action longer than allowed to him by that New York statute. Petitioner's reply is that the New York statute has no application to him because he, as a railway employee employed in interstate carriage, is protected by the federal statute to the exclusion of the State Compensation Law.

Obviously, the pleaded defense would not be available and the petitioner's right to recover in his action would be unquestioned, if he were on the train as the direct employee of Central. We submit that the petitioner's rights and immunities are no different simply because instead of employing car porters directly, Central procured porter service, on the train, by contracting with another corporation—The Pullman Company—to render that indispensible railway service through men hired by or through such other corporation and paid out of transportation revenue.

This Court, in holding the hauling company liable to its passengers for the acts of the sleeping car employees, said in *Pennsylvania Co.* v. *Roy, supra*, 102 U. S. 451, 457:

> "The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its trains, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey."

Yet, can the rights of the employees be circumvented by such a device? A negative answer seems to us inescapable from the express provision in Section 5 of the Federal Employers' Liability Act (Title 45, U. S. C., Sec. 55) that:

"Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt himself from any liability created by this Chapter shall to that extent be void * * *."

Conclusion

It is respectfully submitted that, to the grievous detriment of petitioner, the New York courts have misconstrued the Federal Employers' Liability Act and have erred in refusing to apply it to the petitioner, and for the reasons set forth in the petition (at pp. 8-10, *supra*) and above, the prayer for writ of certiorari should be granted.

Dated: November 2, 1945.

Respectfully submitted,

COPAL MINTZ,
Attorney for Petitioner.